

ROBERT L. WRIGHT
SHELL OIL CO.

IBLA 81-250, 81-1006

Decided November 24, 1981

Consolidated appeals from decision of the Colorado State Office, Bureau of Land Management, declaring that oil and gas lease C-19462 terminated by operation of law for failure to pay timely annual rental in full, and from decision of the Director, Geological Survey, dismissing appeal from decision including subject lands in the Sand Canyon undefined known geologic structure of a producing oil or gas well. GS 180 - O & G.

Affirmed.

1. Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination

An oil and gas lease on which there is no well capable of production terminates automatically by operation of law if the lessee pays only part of the annual rental due on or before the anniversary date of the lease, and if the deficiency in this payment was not nominal and did not result from any incorrect information in a rental bill or decision.

2. Oil and Gas Leases: Rentals -- Oil and Gas Leases: Termination: Notice:
Generally -- Oil and Gas Leases: Known Geologic Structure

BLM has satisfied its burden of giving notice of the inclusion of leased lands in a KGS and of the concomitant increase in annual rental to \$2 per acre or fraction thereof when it notifies the lessees of record, regardless of its failure to notify the holder of operating rights under the lease.

3. Appeals -- Rules of Practice: Appeals: Failure to Appeal -- Rules of Practice: Appeals: Timely Filing

The 30-day period within which an appeal from a decision classifying lands as being within a KGS must be initiated commences upon service on the lessee (or co-lessee) of record of a copy of the decision. Both the lessee and his agent, including the holder of operating rights under the lease, are subject to the 30-day deadline.

APPEARANCES: Ted P. Stockmar, Esq., et al., Denver, Colorado, for Shell Oil Co.; Robert L. Wright, pro se; 1/ Harold J. Baer, Jr., Esq., U.S. Department of the Interior, Office of the Solicitor, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

Oil and gas lease C 19462 covering 1,704.01 acres in Montezuma County, Colorado, 2/ was issued effective December 1, 1973, to Louis Gower for a term of 10 years, with annual rental of 50 cents per acre or fraction thereof, for a total of \$852.50 per year. Gower subsequently assigned 100 percent of record title to H. L. Bigler, approved by the Bureau of Land Management (BLM) effective June 1, 1974. Bigler in turn assigned 50 percent of record title to Robert L. Wright, approved by BLM effective November 1, 1974. Bigler retained the remaining 50 percent of record title.

On June 3, 1975, BLM approved a lease operating agreement and an assignment of operating rights in the lease "below the base of the Hermosa formation" effectively from Wright and Bigler to Shell Oil Company (Shell). 3/ Wright and Bigler remained the owners of record and filed a lessee bond with BLM on June 21, 1976, which BLM approved on July 9, 1976. 4/

1/ Guy B. Dyer, Jr., Esq., Cortez, Colorado, filed a notice of appeal on Wright's behalf, but Wright filed a statement of reasons pro se.

2/ The lands covered by this lease are as follows: SW 1/4 NE 1/4 sec. 9; S 1/2 NW 1/4, SW 1/4, and lots 3 - 8 sec. 17; W 1/2 and lots 1 - 8 sec. 20; and NW 1/4, W 1/2 SW 1/4, NE 1/4 SW 1/4, lots 1 - 5, and lot 8 sec. 29, T. 36 N., R. 17 W., New Mexico principal meridian.

3/ The transaction was actually two assignments, one from Wright and Bigler to Edward Watlington, and a second from Watlington to Shell.

4/ On Dec. 23, 1977, BLM approved the assignments by Wright and Bigler totalling 100 percent of operating rights in leased lands lying above the base of the Hermosa formation. B & W Oil Company received an undivided 90 percent interest in these rights and C. E. and Ruth McClelland received an undivided 10 percent interest therein. These parties did not appeal the termination of the underlying lease.

Advance annual rental for the lease was timely submitted through December 1, 1978, with Shell submitting the payments in 1975, 1976, 1977, and 1978. On July 11, 1979, BLM issued a decision captioned "Increase in Rental Rate" declaring that all of the lands covered by the lease had been classified as being within the Sand Canyon known geologic structure (KGS) and that annual rental would increase to \$2 per acre or fraction thereof for all lands in the lease as of the lease year beginning on December 1, 1979. BLM sent copies of this decision by certified mail to lessees' addresses of record, and the case file contains return receipt cards signed by Mrs. Bob Wright and H. L. Bigler evincing receipt of these copies on July 13, 1979. No appeal was filed of the decision raising the rental.

On November 23, 1979, Shell submitted advance annual rental for the lease year beginning on December 1, 1979, in the amount of \$852.50, or 50 cents per acre, not at \$2 per acre as required. On November 29, 1979, BLM sent Wright a receipt for the payment which noted as follows: "Under payment of \$2557.50[.] Unless other action is pending or the balance due is paid by the due date this lease may be terminated." No additional payment was received before December 3, 1979, the first business day following the anniversary date.

On November 19, 1980, almost a year later, Shell tendered another payment of \$852.50 to BLM for the lease year beginning on December 1, 1980. Evidently, this tender caused BLM to become aware of the previous year's underpayment, since, on November 20, 1980, BLM returned this payment to Shell and, on November 26, 1980, it issued a decision declaring that the lease had terminated automatically by operation of law on December 3, 1979, on account of lessees' failure to pay the full 7th-year advance annual rental. BLM also authorized a refund of the partial advance payment of \$852.50 submitted on November 23, 1979. BLM served this decision on Wright and Bigler and provided Shell with a copy.

On December 4, 1980, Shell tendered a check for \$6,820 in an effort to pay the \$3,410 due both for the lease year beginning on December 1, 1979, and for the lease year beginning on December 1, 1980. BLM returned this tendered remittance on December 5, 1980, citing its decision of November 26, 1980, and restating that the lease had terminated. Wright 5/ and Shell each filed timely notices of appeal of BLM's decision on December 29, 1980.

Sometime after March 9, 1981, 6/ Shell filed an appeal with the Director, Geological Survey (GS), of the memoranda of April 9 and 25,

5/ Wright's notice of appeal does not refer to Bigler and does not purport to be a notice of appeal on his behalf. No other notice of appeal has been filed by Bigler. Accordingly, the indication in Wright's statement of reasons that the appeal was filed on behalf of both Wright and Bigler is in error.

6/ Shell's notice of appeal, dated Mar. 9, 1981, is in the record, but it bears no date stamp or other indication of when it was filed.

1979, by the Director stating that the leased lands were within an undefined addition to the undefined Sand Canyon KGS. On July 16, 1981, the Director dismissed this appeal, holding that the memoranda were not a final order or decision and so were not appealable; that, even if the appeal were regarded as from BLM's decision of July 11, 1979, Shell was without standing to bring the appeal; and that the appeal was untimely. Shell filed a timely appeal of the Director's decision to this Board.

In view of the common background of these appeals, we have consolidated them.

[1] An oil and gas lease on which there is no well capable of production terminates automatically by operation of law if the lessee does not pay advance annual rental for the following lease year on or before the anniversary date of the lease, or the first business day after the anniversary date. 30 U.S.C. § 188(b) (1976); 7/ 43 CFR 3103.3-2(d), 3108.2-1(a); Russell D. Brown, 56 IBLA 345 (1981); Ralph W. M. Keating, 55 IBLA 113 (1981); Margaret Lee Pirtle, 54 IBLA 113 (1981); David R. Fasken, 48 IBLA 258 (1980). The annual rental for lands within a KGS is \$2 per acre. 43 CFR 3103.3-2(b)(1). Wright and Bigler, the lessees of record, were notified explicitly in July 1979 that the lands within the lease were within a KGS and that the rental would be increased to \$2 per acre in the lease year beginning on December 1, 1979. No appeal of this decision was taken. Thus, they were obliged to pay \$2 per acre advance annual rental for these KGS lands, or \$3,410, on or before December 3, 1979, the first business day after the anniversary date, or the lease would terminate automatically by operation of law.

The record shows that the full amount of annual rental due was not paid on or before December 3, 1979, as required. The exceptions

7/ This section provides as follows:

"[U]pon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: Provided, however, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made: Provided, That if the rental payment due under a lease is paid on or before the anniversary date but either (1) the amount of the payment has been or is hereafter deficient and the deficiency is nominal, as determined by the Secretary by regulation, or (2) the payment was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with a bill or decision which has been rendered by him and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless (1) a new lease had been issued prior to May 12, 1970, or (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary."

to the rule mandating automatic termination, stated at 30 U.S.C. § 188(b) (1976) and 43 CFR 3108.2-1(b), 8/ which excuse deficiencies in timely payments where they are "nominal" (not more than the greater of 5 percent of the amount due or \$10) or where they resulted from reliance on incorrect figures in the lease, in a decision, or in a rental bill, do not apply here. Appellants' timely payment on November 23, 1979, was deficient by more than 5 percent of the amount due, and Wright and Bigler were never misinformed by BLM as to the amount due but, to the contrary, were expressly advised of the proper payment. Therefore, under the mandatory provisions of the mineral leasing statute, supra, the lease terminated automatically as of the closing of BLM's office on December 3, 1979.

Appellant Wright denies receiving a copy of BLM's decision of July 11, 1979, notifying lessees of the inclusion of the lands in the KGS and increasing the rental, and he asserts that he first received notice of the increase from its decision of November 26, 1980. The record shows that BLM served a copy of its decision on Wright by sending it by certified mail to his BLM address of record on July 11, 1979, and the post office return receipt card indicates that it was delivered to that address on July 13, 1979. Such service, of course, constituted sufficient notice to Wright of the increase in rental. 43 CFR 1810.2(b).

[2] Appellants Wright and Shell both assert that notice of the increased rental should have been sent to Shell, which was paying rental on the lease. BLM's obligation to give notice of information affecting the amount of rental due on an oil and gas lease is fully

8/ 30 U.S.C. § 188(b) (1976) is set out above at n.6. 43 CFR 3108.2-1(b) provides as follows:

"Exceptions. If the rental payment due under a lease is paid on or before its anniversary date but either the amount of the payment has been or is hereafter deficient and the deficiency is nominal as defined in this section, or the amount of payment made was determined in accordance with the rental or acreage figure stated in the lease or stated in a bill or decision rendered by an authorized officer and such figure is found to be in error resulting in a deficiency, such lease shall not have automatically terminated unless (1) a new lease had been issued prior to May 12, 1979, or (2) the lessee fails to pay the deficiency within the period prescribed in the Notice of Deficiency provided for in this section. A deficiency will be considered nominal if it is not more than \$10 or five per centum (5 percent) of the total payment due, whichever is more. The authorized officer will send a Notice of Deficiency to the lessee on a form approved by the Director. The notice will be sent by certified mail, return receipt requested, and will allow the lessee 15 days from the date of receipt or until the due date, whichever is later, to submit the full balance due to the appropriate office. If the payment called for in the notice is not paid within the time allowed, the lease will have terminated by operation of law as of its anniversary date."

satisfied when it provides the holders of record title with such information. Virgil T. Hartquist, 51 IBLA 356, 360 (1980); David Fasken, *supra* at 260; see Pennzoil United, Inc., 9 IBLA 88, 89 (1973). Where, as here, the lessee of record delegates the responsibility of paying annual rental to an agent, he bears the consequences of the agent's failure to do so. International Resource Enterprises, Inc., 55 IBLA 386 (1981); Samuel Testagrossa, 25 IBLA 64 (1976). This rule, while usually applied in cases where the agent miscarries his duty to pay rental, is equally applicable to the present case, where the principal apparently did not communicate to his agent essential information bearing on the amount of rental due. It works no injustice on a lessee to terminate a lease where the failure to pay the rental stems from his own failure to keep his agent informed of what amount is due. 9/

Appellant Wright asserts that a well was drilled on the leased lands, but has not alleged or shown that such a well was capable of production on December 1, 1979. Thus, even accepting Wright's allegation, there is no statutory bar to the automatic termination of the lease.

Appellant Shell argues that, as of December 1, 1979, the lease had been committed to an approved unit plan including a well capable of producing gas in paying quantities and that, therefore, no rental was due at that time because the lease was in royalty status. The record shows otherwise.

The well with which, Shell argues, this lease was associated by unitization is the Sand Canyon Deep Federal Well 20-36-18 No. 1 and is located in sec. 20, T. 36 N., R. 18 W., New Mexico principal meridian, in the township adjoining this lease. The well is apparently capable of producing a large quantity of carbon dioxide gas, and the Sand Canyon Deep Unit, comprising 18,148.16 acres, was apparently formed in December 1978 from the lands overlying the formation bearing the carbon dioxide. This unit did not include the leased lands.

On January 25, 1979, Shell filed a request with GS to expand the Sand Canyon Deep Unit to include, *inter alia*, the acreage covered by the instant lease, alleging that the carbon dioxide formation extended under these lands as well. Significantly, on September 20, 1979, prior to the December 1, 1979, anniversary date, GS advised Shell that it was withholding any decision on its application to expand the unit to include these leased lands, but that it would not object to

9/ We do not imply that the Department would have the authority to reinstate this lease even if the failure to pay were shown to have been justifiable. Where, as here, full payment is not received within 20 days after the anniversary date on which it was due, there is no authority under existing law to reinstate a terminated lease. 30 U.S.C. § 188(b) (1976); David R. Fasken, *supra* at 262.

the expansion if it was accomplished under the provisions of the unit agreement within 1 year. GS advised Shell that it required five copies of an application for final approval.

Shell cites GS's letter of September 20, 1979, as a decision to include the leased lands in the unit. Although couched in terms of a grant of "preliminary approval," the letter from GS did not effectively add the leased lands to the Sand Canyon Deep Unit. Instead, it merely expressed GS's intention not to oppose the unitization in the future, provided that the terms of the unit agreement were met within a year. It left the matter to Shell to pursue by requiring an application for final approval. Thus, it is clear from GS's letter that, without further action, the leased area was not included in the unit at that time. Shell probably recognized this fact, since it tendered annual rental in November 1979, an action which is inconsistent with its present assertion that no annual rental was due because the leased lands were then a part of a unit with a producing well.

In any event, the subsequent issuance by GS on January 21, 1981, of final approval of expansion of the Sand Canyon Deep Unit to include the leased lands demonstrates conclusively that GS did not consider the leased lands a part of this unit until this date. Thus, the earliest date for considering the instant lease to be associated with a producing well is January 21, 1981 (see Kirkpatrick Oil Co., 32 IBLA 329 (1977), aff'd, Kirkpatrick Oil & Gas Co. v. United States, Civ. No. 77-1247-B (W.D. Okla. Nov. 26, 1979)), long after the December 1, 1979, anniversary date.

[3] Shell asserts in both of its appeals that GS improperly determined that the Sand Canyon KGS was "undefined" rather than "defined." Shell argues that this asserted error adversely affected it because GS does not publish notice of "undefined" KGS determinations in the Federal Register (see 43 CFR 3100.7-2), so that Shell could not receive notice of the rental increase in this manner. Shell also asserts that there is no statutory authority for the distinction between "defined" and "undefined" KGS's.

Upon the lessees' receipt of copies of BLM's decision on July 13, 1979, the 30-day time period for filing with BLM or GS an appeal or appeals of any aspect thereof began to run. 30 CFR 290.3(a); 43 CFR 4.411. BLM's decision was final, and it announced unequivocally the determination that the leased lands were within a KGS. Accordingly, lessees and/or their agents (including Shell) were required to appeal at that time, and the present appeals of the propriety of the "undefined" determinations are untimely and must be dismissed since we are without jurisdiction to consider them. DNA - People's Legal Services, 49 IBLA 307 (1980); Ilean Landis, 49 IBLA 59 (1980).

Furthermore, Shell had actual notice of the KGS determination not later than in November 1980, when it has served with BLM's notification that the lease had automatically terminated. This notification

expressly alludes to the previous KGS determination. Thus, even if its earlier failure to appeal could be ignored, it is clear that Shell failed to appeal within 30 days of its receipt of this notice, since it did not file its appeal with GS until after March 9, 1981.

Shell has requested an evidentiary hearing on several questions. The present record affords an adequate factual basis on which to resolve all of these questions. Therefore, Shell's request is denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Bernard V. Parrette
Chief Administrative Judge

We concur:

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge